The Surety & Fidelity Association of America

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July 29, 2013

Via Electronic Mail (secretary@fmc.gov)

Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capital Street, NW
Washington, DC 20573

Re: Advance Notice of Proposed Rulemaking
Amendments to Regulations Governing
Ocean Transportation Intermediary
Financial Responsibility Requirements
Docket No. 13-05

Dear Ms. Gregory:

The Surety & Fidelity Association of America ("SFAA") is a trade association of approximately 450 companies that are licensed to provide surety and fidelity bonds. SFAA member companies collectively account for the vast majority of surety bonds that are provided in the United States, including bonds for Ocean Transportation Intermediaries. We have had an opportunity to review the captioned Advanced Notice of Proposed Rulemaking. We provide comment regarding the financial responsibility requirements beginning at 46 CFR 515.21, particularly the provisions regarding claims handling. The provisions place additional obligations and burdens on the surety, increasing its exposure and cost. This increased risk could discourage sureties from writing this type of bond.

Section 515.23(b) sets forth the circumstances under with coverage under the financial assurance would be available. Specifically, the bond (or other financial assurance) would be available if the intermediary consents to payment or the intermediary fails to respond to the claim within 45 days of the date of the claims notice. Although this provision is not new, we must point out that it is missing another possible scenario: the intermediary responds and does not consent to the claim, but the surety has determined the claim is valid. Unlike other lines of insurance in which there are two parties—insurer and insured—surety is a three party coverage—the principal(intermediary), the obligee (Federal Maritime Commission) ("FMC") and the surety, which guarantees the obligations of the bond principal. When the surety determines that there is a valid claim on the bond, the surety typically has an obligation to pay, whether or not the bond principal agrees. This obligation is a core value of the bond to the FMC and the potential claimants. Under the provisions regarding the payment of claims (§515.23(b)), what if the surety determines the claim is valid but the broker does not consent-- must the surety pay? Is the surety liable if the broker directs the surety not to pay? This provision is

ambiguous in terms of the surety bond, although it may make sense in terms of other types of financial assurance.

The rulemaking proposes new provisions in § 515.23 that address the priority of claims and imposes new obligations on the surety, such as payment of claims based on the class of the claimant, withholding claims payment upon the receipt of multiple claims and providing notice of claims to the Bureau of Certification and Licensing. Under the proposed provisions a surety would be obligated to engage in activities and a complicated process that are not involved in a typical claims review. This increases the cost of claims handling and creates potential exposures for the surety if it neglected to act in accordance with the requirements. For example, if a surety paid a valid claim to a common carrier first and exhausted the bond penalty, is the surety liable to other claimants that had a higher priority (even if it received claims from higher priority claimant at a later time)? What are the consequences for the surety's failure to provide notice to BCL?

In many cases, a surety does not desire to act as a referee and settle competing claims under the bond. We recommend that the regulations should provide the surety the option to file an interpleader action in a court of competent jurisdiction when there are competing claims.

In cases where the surety desires to address competing claims, the surety should have the ability to pay the claims received within a definite time period on a pro rata basis. Further the regulations should state that when the bond penalty is exhausted, the surety is discharged.

Moreover, the regulations should establish clearer parameters within which the surety can settle the claims with certainty. The regulations should provide more clarity regarding when two or more claims are competing. Must the claims be received on the same day or within a certain time period? Do the priority requirements apply to claims received concurrently, or any claims received during the term of the bond? That is, may the surety pay the claim of a lower priority claimant (e.g. a common carrier) if it has no other claims at the time of the claims payment?

The provisions discussed above increase a surety's risk. A surety addresses the increased risk by tightening its underwriting requirements. As a result, the surety bond may not be widely available. We would be happy to discuss this Advanced Notice of Proposed Rulemaking further with you. As the trade association of surety companies, we could facilitate dialogue between the Federal Maritime Commission and sureties to help you develop workable provision in the Notice of Proposed Rulemaking. I may be reached by telephone at 202-778-3630 or by email at rduke@surety.org. Thank you for your consideration

Sincerely,

Robert J. Duke